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Supreme Court of the United States

October Term, 1970

No. 1132

NEBEL TOWING COMPANY, INC., et al.,
Petitioners,

versus

OLYMPIC TOWING CORPORATION,
Respondent.

IN THE MATTER OF NEBEL TOWING COMPANY, INC., as owner *pro hac vice*, and G.H., INC., as owner, of the Tug *G-H*, praying for exoneration from, or limitation of, liability.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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Contrary to the petition, the *Cushing* case[1] did not leave undecided the federal questions here involved. Justice Clark joined with the Chief Justice and Justices Black, Douglas and Minton in holding that neither the Limited Liability Act nor the "uniformity of admiralty law" precludes direct actions against marine liability insurers.

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[1] *Maryland Casualty Company vs Cushing*, 347 US 409 (1953).

Justice Clark pointed out in *Cushing* that he could "see no necessity for invalidating Louisiana's law by dismissing these direct actions. In administering the Limited Liability Act the Court can easily avoid a clear conflict between it and the direct action statute. The Limited Liability Act admittedly was not designed for the benefit of insurance companies; nor does it deal with their liability." 347 US at 423.

And as Judge Wisdom stated in *Coleman vs Jahncke Service, Inc.*, "The (Louisiana) Direct Action statute, by its terms, applies to every 'policy or contract of liability insurance. . . . There is no indication in Section 655 that the Louisiana Legislature intended to deny the right of direct action to persons covered by marine policies, while extending it to all others.' "[2]

Justice Clark diverged from the other four Justices only in holding that procedures must be devised to protect the shipowner against the possibility of exhaustion of its insurance coverage by direct actions. The Louisiana federal courts and the Fifth Circuit, following Justice Clark's postulate (347 US at 425), have effectively worked out those procedures.[3]

Thus, that part of the *Cushing* opinion on which petitioners rely in support of their petition (page 6), was

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[2]341 F2d 956, 960, 961 (CA 5-1965); cited also by Judge Gewin of the Court of Appeals for the Fifth Circuit in the instant suit. See appendix to petitioner's brief, p. 46.

[3]See *In Re Independent Towing Company*, 242 FS 950 (ED La.-1965); *Tokyo Marine & Fire Ins. Co. vs Aetna Casualty & Surety Co.*, 322 F2d 113 (CA 5-1963); *Guillot vs Cenac Towing Company*, 366 F2d 898, 904, 909 (CA 5-1966).

a minority opinion on the federal question they now seek again to raise.

Point 2 of the petition, like Judge Brown's dissent from the denial of rehearing (petition, pp. 57-71), involves only the state-law question, whether under applicable Louisiana statutory provisions, limitation of liability is a defense which inures to the insurer in a direct action.[4] This ques-

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[4]The argument that limitation is not a defense personal to the shipowner, but should inure to his underwriter under Louisiana Civil Code Article 2098, is unfounded. See *In Re Independent Towing Company, supra*, approved in Note, 40 Tulane Law 150, 156, and *Alcoa Steamship Company vs Charles Ferran & Co.*, 251 FS 823, 831 (ED La.-1966), aff'd. 383 F2d 46, 56 (CA 5-1967); cert. den. 393 US 836. The latter decision explains why a contractual limitation of liability, arising from the obligation itself and affecting the plaintiff's cause of action, may be availed of by the insurer; whereas statutory limitation of liability—which does not arise from the obligation but from the shipowner's status as such, which affects only the right and not the cause of action, and the benefits of which are expressly limited by law to shipowners—does not inure to the insurer. Accord: *Underwood vs American Employers Ins. Co.*, 282 FS 423, 426-27 (ED La.-1966). Like the bankruptcy laws, the limitation statutes do not destroy the underlying claims, which may be enforced against validly preexisting security therefor [Collier Bankruptcy Manual (2d Ed.) §57.04(2), (4), (5)] or against liability insurers subject to direct actions, and other codebtors [*Merchants Liability Company vs Smart*, 267 US 126 (1925); 11 USC §34]. A personal defense such as bankruptcy or limitation, merely limits the injured party's right of action against the tortfeasor without affecting the underlying cause of action, which subsists and may be asserted against the tortfeasor's insurer; only a defense which destroys the cause of action is a non-personal defense available to the insurer. See *Harvey vs New Amsterdam Casualty Co.*, 6 So2d 774, 775 (La. App. Orl.-1942). The fact that limitation is dependent on the shipowner's lack of negligence simply emphasizes the personal nature of this defense. Bankruptcy, sovereign immunity and charitable immunity are all personal defenses, yet each "is connected with and grows out" of the particular claim sued on in the sense that each, exactly like limitation, depends on the tortfeasor's conduct from which the claim arose; bankruptcy discharges a claim only if it did not result from the bankrupt's fraudulent or willful and malicious acts (11 USC §35); sovereign immunity may be pleaded only if the claim

tion, too, has uniformly been decided adversely to petitioners by the Louisiana federal courts and the Fifth Circuit.[5]

Since this Court does not sit to review questions of state law, and since the federal issues were decided by five of the nine justices who participated in the *Cushing* case, it is respectfully submitted that there is no valid reason for exercise of this Court's certiorari jurisdiction in this instance.

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February, 1970

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arose from the defendant's acts in its governmental as distinguished from its proprietary capacity [*Brooks vs Bass*, 184 So. 222 (La. App.-1938)]; and charitable immunity may be pleaded only if the defendant's wrongful act injured a beneficiary of its charitable activities rather than a non-beneficiary thereof [*Lusk vs USF&G Co.*, 199 So. 666 (La. App.-1941)].

[5] *Coleman vs Jahncke, Inc.*, 341 F2d 956, 960, 961 (CA 5-1965); *Lovless vs Employers' Liability Assurance Corporation*, 218 F2d 714, 715 (CA 5-1955); *In Re Independent Towing Company, supra; Guillot vs Cenac Towing Company, supra; Tokyo Marine & Fire Insurance Company vs Aetna Casualty & Surety Company, supra.*

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief in Opposition to Petition for Certiorari was posted, first class, postage prepaid, to John W. Sims, Attorney for Petitioner, Hibernia Bank Building, New Orleans, Louisiana, this day of February, 1970.

Cornelius G. Van Dalen